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No. 03-1454

In The

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, *et al.*,

Petitioners,

v.

ANGEL McCLARY RAICH, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF COMMUNITY RIGHTS COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, exceeds Congress's power under the Commerce Clause as applied to the intrastate cultivation and possession of marijuana for purported personal "medicinal" use or to the distribution of marijuana without charge for such use.

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INTEREST OF THE *AMICUS CURIAE*[1]

Community Rights Counsel (CRC) is a nonprofit, public interest law firm that assists government officials in defending against constitutional challenges to federal, State, and local protections, with a particular emphasis on challenges under the Takings Clause, Commerce Clause, and Supremacy Clause.

Since its founding in 1997, CRC has filed *amicus* briefs with this Court in support of many federal, State, and local government laws, including regional protections for Lake Tahoe, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), State programs to fund legal services for the poor, *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003), State remedies against negligent health maintenance organizations, *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 (2004), regional initiatives to promote clean air, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756 (2004), State wetland protections, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), State common law remedies against negligent pesticide manufacturers, *Eyl v. Ciba-Geigy Corp.*, 123 S. Ct. 2642 (2003), and municipal requirements for addressing toxic waste contamination, *City of Lodi v. Fireman's Fund Ins. Co.*, 538 U.S. 961 (2003). CRC also has represented scores of governmental *amici* in federal and State appellate courts across the country.

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amicus* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

Although we oppose preemption of State law under the Supremacy Clause absent a clear statement of intent to preempt, Congress clearly has invoked its Commerce Clause authority to prohibit the cultivation and distribution of marijuana for medical use. CRC has a strong interest in ensuring stability in Commerce Clause jurisprudence and legislative flexibility to address national concerns embraced by Congress's enumerated powers.

ARGUMENT

We begin with a disclaimer. While we have sympathy for those who turn to marijuana for relief from serious illness and suffering, we take no position on the policy questions posed by medical marijuana use. The question raised by this case is: Who decides? The acceptability of cultivation and distribution of marijuana for medical use should be settled through the political process by those accountable to the voters, not by the federal courts through the unduly narrow reading of the Commerce Clause adopted by the Ninth Circuit.

As recent Commerce Clause cases make clear, the Court polices the "outer limits" of Congress's authority, *United States v. Lopez*, 514 U.S. 549, 566 (1995), but at the same time it places a high value on continued stability in this area of the law. In both *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), the Court was careful to preserve longstanding Commerce Clause precedent so as not to disrupt the legitimate expectations of citizens who have come to rely on basic federal protections. *Lopez*, 514 U.S. at 555-68 (analyzing and applying post-1937 Commerce Clause precedent); *Morrison*, 529 U.S. at 607-19 (same).

As stressed by Justices Kennedy and O'Connor, courts should continue to exercise "great restraint" in reviewing Commerce Clause enactments. *Lopez*, 514 U.S. at 568 (Kennedy, J., with O'Connor, J. concurring). This judicial restraint reflects the simple reality that "the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point." *Id.* at 574.

We show below that well-established precedents provide two straightforward rules of law that compel reversal: 1) Congress may regulate economic activity such as intrastate marijuana cultivation or distribution that, when aggregated with similar economic activity, has a substantial effect on interstate commerce; and 2) where Congress regulates a unified class of activity that substantially affects interstate commerce such as drug traffic, a court should not excise out individual applications of the federal program to intrastate activity, especially where the regulation of intrastate activity is necessary to control interstate activity effectively.

I. CONGRESS MAY REGULATE THE INTRASTATE CULTIVATION OR DISTRIBUTION OF MARIJUANA BECAUSE IT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE.

This case is controlled by *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Wickard*, the central issue was whether the federal government could "extend[] federal regulation to [wheat] production not intended in any part for commerce but wholly for consumption on [Filburn's] farm." *Id.* at 118. It was immaterial to the Court that Filburn's activity involved only wheat cultivation and consumption, as opposed to sale or trade. *Id.* at 120 ("[Q]uestions of the

power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."); *id.* at 125 (although Filburn's wheat cultivation "may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.").

Likewise, it made no difference to the *Wickard* Court that Filburn's cultivation and consumption by itself had only a miniscule effect on interstate commerce. Congress could regulate that cultivation because it could rationally conclude that, when aggregated with all similar economic activity, it had a substantial effect: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-28.

This aggregation principle remains a cornerstone of Commerce Clause jurisprudence. *E.g.*, *Lopez*, 514 U.S. at 558 ("'[W]here *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.'") (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 n. 27 (1968)); *Fry v. United States*, 421 U.S. 542, 547 (1975) (same). To be sure, the Court has raised the possibility of limiting aggregation to economic activity. *See Morrison*, 529 U.S. at 613 ("[W]e need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases."). But there can be no doubt that the aggregation principle applies to

the production and distribution of a valuable commodity such as marijuana, activities that are plainly economic.

When viewed in the aggregate, the intrastate cultivation or distribution of marijuana substantially affects interstate commerce, for much the same reason as the local cultivation and consumption of wheat does. The *Wickard* Court concluded that homegrown wheat could substantially affect interstate commerce because it could displace wheat that would otherwise be purchased in interstate commerce. *Wickard*, 317 U.S. at 128 (homegrown wheat "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market"). In the same way, locally grown marijuana expands the total national supply of the drug and substantially affects marijuana in interstate trade by freeing up an equivalent amount for use by others. Congress rationally could have concluded that, in the aggregate, unregulated homegrown marijuana would substantially affect the national market for this substance, and that banning local cultivation and distribution will significantly reduce the overall supply.

Lopez and *Morrison* are easily distinguished from the case at hand because the federal programs in those cases had nothing to do with any sort of economic enterprise. *Lopez* involved federal regulation of the mere possession of guns near schools, which the Court concluded "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567; *accord id.* at 580 (Kennedy, J., joined by O'Connor, J., concurring) ("[N]either the purposes nor the design of the statute has an evident commercial nexus."). Indeed, given that the gun possession ban applied only within 1000 feet of a school, the Court emphasized that the ban was "not an essential

part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated." *Id.* at 561. Similarly, the regulated activity in *Morrison*, gender-related violence, is "not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. The *Morrison* Court reaffirmed that the noneconomic nature of the regulated conduct was "central" to both *Morrison* and *Lopez*. *Id.* at 610.

In contrast, the Controlled Substances Act targets the cultivation and distribution of a valuable commodity, activities that are indisputably economic. That the distribution might occur for free is of no consequence, just as the absence of any sale was of no consequence in *Wickard*, because even the free distribution of a commodity still constitutes economic activity and thus should be subject to aggregation. *See Lopez*, 514 U.S. at 556, 559-60 (describing the "production and consumption of homegrown wheat" in *Wickard* as economic activity even "'though it may not be regarded as commerce'") (quoting *Wickard*).

The federal controls at issue here raise none of the concerns that troubled the Court in *Lopez* and *Morrison*. For example, the Court viewed the government's position in those cases – particularly its proffered chain of causation between the regulated activity and interstate commerce – as so fatally attenuated as to threaten the elimination of all limits on federal power. *See Lopez*, 514 U.S. at 564 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."); *Morrison*, 529 U.S. at 615 ("Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as

unworkable if we are to maintain the Constitution's enumeration of powers.").

In contrast, the findings supporting the Controlled Substances Act are direct and commonsensical, rooted in the eminently reasonable notion that law enforcement authorities cannot distinguish between drugs based on whether they have traveled intrastate or interstate, and that locally produced drugs add to the overall national supply in a harmful way. 21 U.S.C. §§ 801(3)-(6). They do not "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power." *Lopez*, 514 U.S. at 567. Rather, they suggest only the reasonable conclusion that when Congress seeks to control interstate traffic in a particular commodity, it may regulate the intrastate cultivation or distribution of that commodity where it is infeasible to distinguish between the two, and where intrastate production and distribution substantially affect interstate traffic.

II. CONGRESS MAY REGULATE THE INTRASTATE CULTIVATION OR DISTRIBUTION OF MARIJUANA AS PART OF A CLASS OF ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE.

A. Congress May Regulate All Marijuana Cultivation and Distribution As a Class.

A second line of Commerce Clause cases provides additional support for petitioners by authorizing Congress to address an entire "class of activity" without establishing exceptions for individual intrastate applications. In *Perez v. United States*, 402 U.S. 146 (1971), the Court upheld a

criminal statute prohibiting extortionate credit transactions even though the law did not require any showing by the prosecution that the transaction resulted in the interstate movement of goods, involved the use of the facilities of interstate commerce, or affected interstate commerce. Rather, the *Perez* Court stressed that Congress could rationally conclude that extortion as a class of activity affects interstate commerce. *Id.* at 154-55. The Court could not have been clearer: "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

The *Perez* Court held that Congress rationally could conclude that loan sharking provides organized crime with a lucrative source of revenue, allows organized crime to launder money obtained through illegal gambling and narcotics rackets, and leads to the takeover of legitimate businesses. *Id.* at 155-57. Because Congress had authority to regulate the overall class of activity that comprises extortionate credit transactions, it made no difference whether the particular extortion carried out by Perez affected interstate commerce.

The Court also used this "class of activity" analysis in *Wirtz* to uphold the application of federal wage and hour controls on employees of hospitals, schools, and similar enterprises, even though the employees had no direct connection to interstate commerce. *Wirtz*, 392 U.S. at 193. The *Wirtz* Court emphasized that when Congress exercises its power to declare that an entire class of activity substantially affects commerce, "[t]he only question for the courts is then whether the class is 'within the reach of the federal power.'" *Id.* at 192 (citation omitted).

Since *Lopez*, federal courts have continued to rely on the *Perez* "class of activity" doctrine to sustain a variety of federal laws.[2] Because Congress could rationally conclude that the cultivation and distribution of marijuana as a class of activity substantially affects interstate commerce, it may regulate the entire class, and courts should not excise individual instances of intrastate activity.

To be sure, Congress should not be allowed to circumvent established precedent and regulate activity that falls outside its constitutional authority through the simple expedient of attaching federal controls to otherwise permissible regulation. For example, Congress could not resurrect the provisions struck down in *Lopez* and *Morrison* by

[2] *E.g.*, *United States v. Holston*, 343 F.3d 83, 90-91 (2d Cir. 2003) (upholding conviction under federal child pornography law, notwithstanding failure to prove defendant intended to sell it, because when Congress regulates a class of activities that substantially affect interstate commerce, "[t]he government need not demonstrate a nexus to interstate commerce in every prosecution"); *United States v. Turner*, 301 F.3d 541, 547-48 (7th Cir. 2002) (upholding conviction under federal law that prohibits employees from embezzling from insurance companies even if defendant's actions did not affect interstate commerce, because "we look to the 'class of activities' and determine their 'total incidence' on interstate commerce") (quoting *Perez* and *Wirtz*), *cert. denied*, 537 U.S. 1077 (2002); *United States v. Cortes*, 299 F.3d 1030, 1036 (9th Cir. 2002) (upholding application of federal carjacking law because carjacking as a class of activity affects interstate commerce, regardless of whether a particular instance has a trivial effect), *cert. denied*, 537 U.S. 1224 (2003); *Navegar, Inc. v. United States*, 192 F.3d 1050, 1061 n.7 (D.C. Cir. 1999) (Congress may ban intrastate possession of semiautomatic assault weapons as part of a broad prohibition on any manufacture, transfer, or possession because the class of activity affects interstate commerce, citing *Perez*); *United States v. Olin*, 107 F.3d 1506, 1509-11 (11th Cir. 1997) (upholding application of federal toxic waste cleanup requirements, notwithstanding absence of evidence that waste caused off-site damage, because the class of regulated activity substantially affects interstate commerce).

reenacting them as part of an interstate transportation bill and deeming the resulting jumble of unrelated provisions a "class" of activity. But where Congress addresses a rationally unified class of activity that substantially affects interstate commerce, such as drug traffic, longstanding precedent precludes the courts from redacting individual intrastate applications out of the federal program.

B. Congress May Regulate All Marijuana Cultivation and Distribution As a Class To Promote Adequate Enforcement.

The "class of activity" line of authority applies with particular force where regulation of the entire class is necessary to ensure adequate enforcement. The Court long has recognized that "where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation." *Lopez*, 514 U.S. at 554 (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914)). As noted above, the *Lopez* Court stressed that the limited gun ban before it, which applied only within 1000 feet of schools, was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. The *Shreveport Rate Cases*, in turn, discuss several other cases sustaining congressional regulation of intrastate activity where necessary to control interstate commerce. *See Shreveport Rate Cases*, 234 U.S. at 352-53.

Here, Congress reasonably found that the regulation of the intrastate incidents of drug traffic is "essential" to

the effective control of interstate drug trade. 21 U.S.C. § 801(6). Although "Congress normally is not required to make formal findings" supporting its assertion of Commerce Clause authority, *Lopez*, 514 U.S. at 562, the Controlled Substances Act contains extensive congressional findings on how controlled substances produced or distributed intrastate are indistinguishable from those in interstate commerce and thus, if left unregulated, would undermine law enforcement efforts to control interstate drug trade. Specifically, Congress found that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate." 21 U.S.C. § 801(5). Congress also reasonably found that local manufacture and distribution of these fungible products can easily lead to interstate transport. *Id.* at § 801(4). As a result, "[f]ederal control of the intrastate incidents of the traffic in controlled substances is *essential* to the effective control of the interstate incidents of such traffic." *Id.* § 801(6) (emphasis added).

The Court repeatedly has relied on the inability to distinguish intrastate from interstate activity to uphold federal laws that regulate both together. *See, e.g., Currin v. Wallace*, 306 U.S. 1, 11 (1939) (Congress may regulate intrastate and interstate transactions in the tobacco market where transactions were conducted "in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale"); *Shreveport Rate Cases*, 234 U.S. at 351-52 ("Wherever the interstate and intrastate transactions of

carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule.").

The use of marijuana for medical, as opposed to recreational, reasons does not change the analysis. Creating an exception for medical use could undermine enforcement efforts by imposing an often difficult burden on prosecutors of establishing the violator's subjective motivation and intent beyond a reasonable doubt. Given that marijuana used in response to medical ailments is not readily distinguishable from marijuana used for other reasons, Congress rationally concluded that the control of all use is necessary to address the national market for controlled substances.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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